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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 548th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 2 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

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Draft Convention on Independent Guarantees and Stand-by Letters of Credit (*continued*)

Article 1 (*continued*)

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The meeting was called to order at 2.05 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

Article 1 (*continued*) (A/CN.9/408, annex)

Paragraph 1 (*continued*)

1. **The CHAIRMAN**, speaking as representative of Singapore, associated himself with the remarks made by the German delegation at the previous meeting. The Convention could only state what it applied to and what it did not apply to, but could not dictate to the legislature of a Contracting State. However, it was to be assumed that, if a Contracting State introduced legislation to implement the Convention (or model law), it would probably comply with the requirements of the Convention.

2. **Ms. ZHANG Yuejiao** (China) shared the view of the German delegation. A convention was preferable to a model law.

3. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that, if there were no comments on the question raised by Sweden regarding the effect of the clause "unless the undertaking excludes the application of the Convention", he would assume that the Commission accepted the draft of article 1 (1) (a) as it stood.

4. *It was so agreed.*

5. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) drew the Commission's attention to the Japanese suggestion that the Convention might include a provision similar to that in article 6 of the Vienna Sales Convention. In view of the Secretary's earlier remarks on the matter and bearing in mind that the text mentioned possible choices other than those provided for in the Convention, he thought that the Commission might not wish to accept the Japanese proposal.

6. *It was so agreed.*

7. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) invited the Commission to discuss whether the product of its deliberations should be a convention or a model law.

8. **The CHAIRMAN**, speaking as representative of Singapore, asked whether the United Nations would have to convene a diplomatic conference if the text adopted took the form of a draft convention.

9. **Mr. HERRMANN** (Secretary of the Commission) said that a diplomatic conference would not necessarily have to be convened. He reminded the Commission that the General Assembly had constituted itself as a diplomatic conference to adopt the United Nations Convention on International Bills of Exchange and International Promissory Notes in 1988.

(*Mr. Herrmann, Secretary of the Commission*)

10. Informal talks had been held with those in charge of the programme of work for the Sixth Committee at the fiftieth session of the General Assembly, from which it appeared that, as consideration of one major agenda item had been postponed, there was a possibility that the draft Convention might be considered at that session.

11. **Mr. BYRNE** (United States of America) said that the Working Group has assumed that the text would take the form of a convention and not of a model law, in view of the need to harmonize international practice. The very flexibility of a model law would militate against international harmony, and a recognized legal regime was needed with regard to international instruments. The difficult and dangerous area of fraud could not be covered by means of private rules. It would be preferable to permit individual reservations rather than adopt a model law.

12. **Ms. BAZAROVA** (Russian Federation) agreed with the representative of the United States of America. When work had been begun on the text six years previously, her country had not had any legislation on independent guarantees. Since then it had been making use of the material produced by the Commission, for which it was very grateful. Internally, therefore, it no longer had any need of a model law. An international document, on the other hand, would be of assistance in dealing with international obligations. She therefore supported the adoption of a convention, particularly since the text left countries a good deal of freedom.

13. **Mr. GRANDINO RODAS** (Brazil) supported the adoption of a model law.

14. **Mr. RADWAN** (Observer for the Arab Association for International Arbitration) said that an international convention could be interpreted as the imposition of the law of the strong on the weak, especially in international trade. The history of international conventions showed that they were highly subject to amendment. It would be better to opt for a model law.

15. **Mr. STOUFFLET** (France) said that he was not completely convinced by the arguments advanced in favour of a model law. It had been said that a model law would have flexibility, but the draft was itself flexible enough. It offered the possibility of opting out on a number of points.

16. Tried and tested legal mechanisms for stand-by letters of credit and guarantees already existed. He agreed with the representative of the United States of America that what was needed was to reduce the differences between existing systems, for which purpose a convention would be preferable to a model law.

17. If understanding could not be achieved, a model law would be better than nothing, but the Commission should abide by its mandate and strive for a convention.

18. **Mr. ILLESCAS** (Spain) said the product of the Commission's work should be a convention because it would have a more unifying effect than a model law. The issue of independent guarantees and stand-by letters of credit had very serious consequences for all parties involved. At present, however, those instruments had different effects, especially for issuers, according to the country of issue. It was desirable that everyone involved in such transactions should know just where they stood, and that could not be provided for under a model law, from which countries would be free to depart. The Working Group had allowed for a reasonable degree of flexibility within the text; however, an excess of flexibility could permit mutually

(Mr. Illescas, Spain)

contradictory practices in different countries thus disappointing the expectations with regard to assurance of receipt of payment that the adoption of an international legal instrument would generate. He accordingly supported the option of a convention.

19. **Ms. ZHANG Yuejiao** (China) said that she inclined to share the opinion of the German delegation. At the same time, her delegation felt that a model law would also be acceptable. She would have difficulty supporting a convention containing final clauses which provided that there should be no reservations.

20. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) explained that the Commission had before it a draft of final clauses (A/CN.9/411) prepared by the Secretariat, which still had to be discussed. The provision referred to by the Chinese representative was an interpretation of an existing principle of international treaty law that reservations were not allowed unless they were specifically provided for. It remained to be seen whether the Commission would adopt it or not.

21. **Mr. ADENSAMER** (Austria) considered that the rules should take the form of a convention.

22. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that the text as it stood would provide sufficient flexibility for those countries that would prefer a model law if it were adopted as a convention.

23. **Mr. VASSEUR** (Observer for Monaco), referring to the draft final clause ruling out the possibility of making reservations, said that, though that clause had not yet been adopted, he understood that there was not much chance of its being modified. Other recent UNCITRAL texts had had similar clauses. It was therefore not possible to proceed on the assumption that if the text took the form of a convention, States preferring the model law form would be able to make reservations.

24. **Ms. ASTOLA** (Finland) said that Finland had always been in favour of a convention. Despite the danger that it might not be ratified, a convention was still preferable to a model law.

25. **Ms. JASZCZYNSKA** (Poland) said that Poland was in favour of a convention.

26. **Mr. EDWARDS** (Australia) said he was in favour of the Working Group's recommendation for a convention. A model law would result in a large number of differences between national laws and would not contribute to harmonization. The most important thing was to achieve real certainty on key issues, a certainty that did not at present exist.

27. **Mr. FAYERS** (United Kingdom) said that the United Kingdom would have preferred a model law, but had been persuaded by the argument that a convention would promote the harmonization of international banking practices. Though the freedom allowed by a model law might enable it to win greater acceptance, the text as it stood offered a great deal of flexibility.

28. **Mr. OGARRIO** (Mexico) and **Mr. LAMBERTZ** (Observer for Sweden) expressed their support for a convention.

29. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) took it that the Commission agreed that the text should take the form of a convention.

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30. **Mr. MARKUS** (Observer for Switzerland) said that paragraph (1) (b) should be deleted since it added nothing to the text and might lead to difficulties in practice. The purpose of paragraph (1) (b) was to extend the international field of application of the Convention, but it did not in fact do so, because it had exactly the same connecting factor as paragraph (1) (a). In his view, it would make no difference whether paragraph (1) (b) were deleted or not, except in the case of a choice of law, but in that case it would be more appropriate and simple to add an opt-in clause to the already existing opt-out clause.

31. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that paragraph (1) (b) was an important provision as it dealt with the scope of the Convention, the aim of which was to harmonize international trade law. As the phrase "unless the undertaking excludes the application of the Convention" appeared to make it possible for parties to circumvent the terms of the Convention, he proposed its deletion.

32. **Ms. CZERWENKA** (Germany) supported the suggestion made by the observer for Switzerland. When the issue of reservations to the Convention came to be discussed, it might be necessary to refer to paragraph (1) (b) if that article were left as it stood. What seemed a perfectly straightforward matter might become much more complicated if the Commission later decided to allow reservations. For the sake of simplicity, it would therefore be preferable to delete paragraph (1) (b).

33. **Mr. FAYERS** (United Kingdom) said that in his view, paragraph (1) (b) was intended to and did in fact add something to paragraph (1) (a). Indeed those who had drafted the Vienna Sales Convention had come to the conclusion that a similar provision was necessary. However, it might nevertheless be preferable to delete paragraph (1) (b), because it merely stated what the judge would do in any case. If it were retained, it would be necessary to consider carefully the wording in paragraph (3).

34. **Mr. HERRMANN** (Secretary of the Commission) said that the main reason given for deleting paragraph (1) (b) was that it simply stated what happened in any case. But the fact that a provision was redundant had not in the past prevented the Commission from including it. What might be self evident for some people was not necessarily self-evident for everybody. Moreover, leaving something out because it was self-evident might lead people to draw the wrong conclusions. In contrast to the Vienna Sales Convention, the present draft Convention contained a rule on conflict of laws. The provision in question did not state what rule of private international law led to the application of the law of a Contracting State. The Convention might apply as a result of a positive choice of law. He observed that the application of paragraph (1) (b) had a much narrower scope in practice than the corresponding provision in the Sales Convention owing to the conflict of laws rule in article 21. But despite its more limited practical application, it would be wrong to conclude that it had no effect at all.

35. **Mr. GAUTHIER** (Chairman of the Committee of the Whole), seeing no further support for the suggestion made by the observer for Switzerland, took it that the Commission wished to retain the text as it stood.

The meeting was suspended at 3.25 p.m. and resumed at 3.50 p.m.

Paragraph 2

36. **Mr. GAUTHIER** (Chairman of the Committee of the Whole), introducing article 1 (2), said that the Working Group had explored several approaches concerning what might be called an opting-in type of provision for commercial letters of credit, but had eventually focused on a way of bridging the differences

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(Mr. Gauthier, Chairman of the Committee of the Whole)

between of independent guarantees and stand-by letters of credit and developed a set of uniform rules that would cover both fields. Basically, the present text stipulated that if those using letters of credit other than stand-by letters of credit wanted the Convention to apply, they must say so.

37. **Mr. VELEZ-RODRIGUEZ** (Observer for the International Chamber of Commerce) said that, in the view of his organization, articles 1 (2) and 20 constituted a threat to the stability of well-established international practices. Bank guarantees and stand-by letters of credit were contracts between issuers and beneficiaries that were linked to, but independent of, contracts between applicants and beneficiaries. Such instruments functioned relatively uniformly and smoothly throughout the world, despite the absence of comparable statutory rules in many countries. International practice was reflected in existing ICC rules such as the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG). By adopting minimally acceptable rules, the draft Convention failed to add anything to URDG or UCP practices except in the case of fraud and provisional court measures. Indeed, by interfering with well-established international practice through the opting-in provision for documentary letters of credit (article 1, paragraph (2)), the text gave rise to serious concern for various reasons. Firstly, under article 2, paragraph (1), only undertakings payable either upon simple demand or upon presentation of other documents were subject to the draft Convention, whereas in practice many undertakings were payable upon presentation of a demand together with other specific documents. Secondly, article 8, paragraph (2), could affect revocable as well as irrevocable undertakings, whereas international practice allowed a revocable undertaking to be amended up to the moment at which the beneficiary made a demand. Thirdly, references in the draft Convention to the "principal applicant" implied that undertakings were in certain respects ancillary to acts or omissions of the applicant, while international practice was founded on complete independence, subject only to the principle *fraus omnia corrumpit*. Fourthly, according to international practice, all terms and conditions of an undertaking had to be embodied in the instrument itself or in any formal amendments thereof, but the draft Convention stated at several points that "the guarantor/issuer and beneficiary may agree elsewhere". Fifthly, the ban on "eternal" undertakings in article 12, paragraph (c), did not conform with international practice, which in some cases allowed the absence of a termination date. Lastly, under certain circumstances specified in article 19, paragraph (1), the issuer was obliged not to honour a demand made despite the fact that international practice allowed the bank discretion to honour its commitment for its own reasons. Moreover, in the case of alleged fraud in the underlying transaction, an issuer having contractual relations with both the applicant and the beneficiary must, in international practice, remain neutral, in contrast to article 19 (1) (b) (ii) of the draft Convention. He concluded by asking the Commission to draw the consequences from his comments and delete article 1 (2).

38. **Ms. CZERWENKA** (Germany) said that her delegation would also favour deleting article 1, paragraph (2). It dealt with a situation where the Convention usually did not apply but parties to an undertaking decided it should. That was outside the scope of application of the Convention and therefore should not be dealt with in the text. Furthermore, the paragraph gave the false impression that the Convention dealt with something other than the undertakings defined in article 2.

39. If the Commission wished to retain the text, it should be redrafted. Either paragraph (1) should state that the Convention applied to stand-by letters of credit, but that other instruments could be opted in as well, or it should state that the Convention applied also to international letters of credit other than those undertakings referred to in article 2.

40. **Mr. KOZOLCHYK** (United States of America) said that there was no real inconsistency between the Uniform Customs and Practice for Documentary Credits (UCP) and paragraph (2). The rules were not meant to contradict anything in the UCP, but rather to supplement it with provisions not covered by it because of its nature. Being customary rules, the UCP could not tell a bank as of which moment its own law required it to be bound by its promise. In many countries where the UCP had been adopted, that could be any one of several different moments in time under local law, and the UCP could do nothing about it because the UCP could not change local law. The Convention could, however, and it did so in a manner consistent with the spirit of the institution.

41. If the basic premise was that the Convention set forth rules of traffic and remedial rules which were not found in the UCP, what was wrong with combining them? There might be transactions that had both a UCP letter of credit and a bank guarantee or stand-by letter of credit covered by the Convention and which stated that the Convention applied. In such cases, two different laws would have to be applied for each part of the transaction, and none of the remedies in the Convention, consistent though they were with the UCP part of the transaction, would be applicable.

42. **Mr. MARKUS** (Observer for Switzerland) said that he also favoured deleting paragraph (2), for three reasons. First of all, in drafting the Convention, the Working Group had concentrated on stand-by letters of credit and bank guarantees, and he doubted that commercial letters of credit had been sufficiently considered. Secondly, the opting-in clause was of a somewhat uncertain legal nature. Thirdly, the notion of "letter of credit" itself was quite unclear, as it was never defined in the Convention. It could be understood very differently in different countries, raising uncertainty as to the entire scope of application of the Convention.

43. **Mr. SHISHIDO** (Japan) also felt that the paragraph should be deleted, not because Japan would find it difficult to include commercial letters of credit in the Convention, but because of the problem of drafting. Since there was no definition of letters of credit, it was not clear which letters of credit could be opted in. In any case, there was no need for the paragraph to include commercial letters of credit, as article 2 did not exclude such letters from the definition of "undertaking" and, under the rule of party autonomy, any of the Convention's provisions could be applied to them.

44. **Mr. FAYERS** (United Kingdom) said that the banks in his country apparently saw no objection to having a provision such as paragraph (2), which would provide their customers with that option if that was what they wanted. The Convention and the UCP were complementary, although some of the provisions of the former were inconsistent with the latter. If the parties were to apply the Convention to their letters of credit, that would entail considerable expense in consulting lawyers on a number of difficult questions. However, he saw no reason in principle why the facility should not be offered to people wishing to contract into the Convention, and he had no objection to retaining the provision. Just because it was not necessary to state something in law did not mean it should not be stated.

45. If the provision were deleted, however, under his country's law it would be possible for the parties to so construct their commercial letters of credit that the provisions of the Convention, in whole or in part, would apply to them. That option — "in whole or in part" — should be available to the parties, and was even more important if some of the provisions were not consistent with the UCP.

46. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that paragraph (2) broadened the scope of application of the Convention and was misleading. It should be deleted.

47. **Mr. VASSEUR** (Observer for Monaco) said that the Banking Federation of the European Union had been greatly surprised by paragraph (2), and had not seen it as complementing the UCP. He asked how anyone could think that banks throughout the world which had adopted the UCP either through banking associations or individually would also want to apply the rules of the Convention. The paragraph was causing some consternation for almost all banks, and none of the associations within the Federation had been in favour of it.

48. **Mr. KOZOLCHYK** (United States of America) said it was difficult to imagine how anyone could oppose the idea of allowing a bank to issue a commercial letter of credit subject to the Convention or why anyone should be afraid to allow the parties to choose to do so. The difficulties which had been raised with respect to paragraph (2) concerned, rather, its formulation, meaning and clarity. The text represented a necessary compromise, because it had proved impossible to define a stand-by letter of credit. Another solution would be to take the opposite approach and expand the scope of the Convention to include commercial letters of credit, allowing the parties to opt out. For commercial letters of credit in the international sphere, there were many advantages to allowing the optional application of the Convention. It provided certainty of a legal sort, which could not be provided in rules, about when the undertaking was effective and the meaning of definitions. It provided definitive rules for the first time of an enlightened and progressive nature on the assignment of proceeds — an issue which the UCP did not and could not cover, because it was a matter for law and not for practice — and on fraud and injunctions.

49. Fraud increasingly dominated the field of commercial and stand-by letters of credit. That would have an impact on applications for extraordinary relief, as to which there was neither an international regime nor international harmony, with respect either to the rules to be applied or to the standard to be used. In that regard, the Convention offered a useful safe harbour for issuers of international letters of credit as well as beneficiaries and applicants, enabling them to know what the regime or standard would be with respect to fraud and extraordinary or injunctive relief.

50. The Convention further provided clear rules on the legal effect of transfer and on set-off and choice of law, which could not be provided by any system of private rules. There was no competition between the Convention and any private regime of rules: the provisions themselves were not in conflict, and they allowed enough flexibility so that the parties could choose to opt out; if there were a conflict, a UCP rule would take precedence over the rule of the Convention. There was nothing in the Convention which contradicted sound banking practice, and the United States banking community, which favoured the inclusion of the provision as at present drafted, felt that it would actually help to promote sound banking practice.

51. As to whether the existence of an international legal regime supplementing private rules of practice would defeat the aim of facilitating trade, his country's experience was that, where there was an express provision in positive law on letters of credit, which supplemented rules of practice such as the UCP, that had an enormous positive effect on the willingness of lawyers and courts to encourage the use of commercial as well as stand-by letters of credit and had provided additional certainty. Many of the arguments put forward against specific provisions of the Convention in relation to commercial letters of credit would be equally valid in relation to guarantees and stand-by letters of credit and would imply that the Convention should not be adopted at all for any instrument. That would be true as well under the Uniform Rules for Demand Guarantees (URDG), with respect to guarantees, and under the UCP, with respect to stand-by letters of credit.

(Mr. Kozolchyk, United States of America)

52. His delegation could agree to a provision which dropped any reference to stand-by letters of credit and indicated that the parties could adopt the Convention with regard to any independent international undertaking, which might avoid some of the problems of definition. But if felt that the Convention should be available for parties in an international commercial transaction and that the text should say so. He asked whether the Secretariat felt the provision was unnecessary.

53. **Mr. ILLESCAS** (Spain) said he saw a great deal of merit in the comments by the representative of the United States of America. Situations did indeed arise in which a letter of credit was backed up by a counter letter of credit, or by a guarantee of due performance for a commercial letter of credit. In such situations, submitting a commercial letter of credit to a different rule from that governing a letter of credit or guarantee on first demand would be a complicated process, which would be at variance with the Convention's objective of achieving uniformity. As drafted, paragraph (2), rather than helping to resolve the conflict, contributed to the confusion through its specific reference to international letters of credit, which were governed by the UCP. The solution might be to find another term which would have the same scope. It must be clear that parties could submit letters of credit other than stand-by letters of credit to the rule if they wished.

54. **Mr. AL-NASSER** (Saudi Arabia) said that his country's banks and chambers of commerce, had discussed paragraph (2) and had concluded that it was ambiguous; some had even thought that it provided a choice between applying the rules of the International Chamber of Commerce and applying those of the Convention. Like the representative of Spain, he believed the paragraph should be reworded in order to dispel its ambiguity. Its effect should be to refer only to documentary credits. In the absence of satisfactory new wording, the paragraph should be deleted.

55. **Mr. LAMBERTZ** (Observer for Sweden) said it seemed the general view that a bank should be able to issue a guarantee or a stand-by letter of credit governed by the Convention, and that the Convention should say so expressly — not because that was necessary, but because it would be useful. If the present wording was misleading, an acceptable solution might be to adopt the suggestion made by Germany to replace the reference to an international letter of credit other than a stand-by letter of credit by a reference to all undertakings not covered by article 2. Paragraph (2) would then read along the following lines: "This Convention applies also to undertakings other than those referred to in article 2 if they expressly state that they are subject to the Convention".

56. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the expression "international letter of credit other than a stand-by letter of credit" had been adopted by the Working Group as being the only alternative to the term "undertaking" itself. If the German suggestion was adopted, the text would become meaningless, since an "undertaking" was something defined in article 2, and therefore the "undertaking" in article 1 (2) — in effect an undertaking "other than an undertaking" — would not be an undertaking within the meaning of the Convention.

57. **Ms. ZHANG Yuejiao** (China) was in favour of keeping paragraph (2), which had the virtue of flexibility.

58. **Ms. BAZAROVA** (Russian Federation) said that paragraph (2) aimed at permitting issuers of commercial letters of credit to apply the Convention to those instruments. She therefore favoured its inclusion, although the text could be worded more clearly. She endorsed the observations of Spain and Saudi Arabia on that point.

59. **Ms. ASTOLA** (Finland) said that her delegation could accept the article with or without paragraph (2). If it was retained it might usefully be redrafted. She found merit in the German suggestion, which as she understood it, was that the paragraph would refer to an international letter of credit other than that defined in article 2, not that it would refer to undertakings other than those defined in the Convention. A simple alternative would be to say that the Convention applied also to a commercial letter of credit if the document so stated. That would avoid the problems raised by linking paragraph (2) to article 2.

60. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted the general agreement that paragraph (2) was acceptable in its principle — namely, that the Convention could be applied to commercial letters of credit by means of a stipulation in the instrument to that effect — as well as the idea that its text should be clarified. As to the exact wording, the approach suggested by the representative of Germany was to speak of an international letter of credit other than an undertaking as defined in article 2. Unless he heard any objection, he would take it that the Commission referred the paragraph to the drafting group on that understanding.

61. *It was so agreed.*

The meeting rose at 5.05 p.m.